

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF AND
APPENDIX**

NO. 76-4259

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

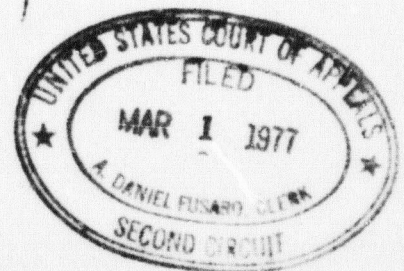
HENRY M. HALL HIGH SCHOOL ASSOCIATION
and THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

APPENDIX

ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.
Washington, D. C. 20570.



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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of Henry M. Hald High School Association
Board Case 29-CA-3813

4.15.74	Charge filed
6.18.74	Complaint and Notice of Pre-Hearing Conference and Notice of Hearing dated
6.28.74	Respondent's Hald's Answer, dated
7.10.74	Respondent Hald's Request for rescheduling of Pre-Hearing Conference and Hearing dated
7.10.74	Charging Party's request for rescheduling of Pre-Hearing conference and Hearing dated
7.11.74	Notices of Cancellation of Pre-Hearing Conference dated
7.15.74	Order Rescheduling Hearing dated
7.22.74	Respondent's Request for Rescheduling Notice of Motion and Motion received
7.23.74	Order denying Motion dated
7.26.74	Regional Director's letter correcting dated
9. 5.74	Stipulation dated
9.30.74	Administrative Law Judge's Decision issued
10.30.74	Respondent's Exceptions to the Administrative Law Judge's Decision received
2. 4.75	Decision and Order of the National Labor Relations Board dated

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Mrs. Nicole Fabien

2

French

French 1

May 18, 1972

27

103

Mrs. Fabien is a very poised and dignified teacher. She is always patient and pleasant with her students. Her rapport with the other faculty members is also very good.

This class was conducted entirely in French. Mrs. Fabien's pronunciation and speech is excellent. She slowly enunciates and strives to make all her students understand. The students were able to converse with the teacher.

The students actively participated and followed all directions given in French. Her students were all involved in the lesson and she maintained their interest. She used appropriate pictures to illustrate several adjectives.

Mrs. Fabien cooperates with all Administrative directions.

Mrs. Fabien moderated the French club.

June 16, 1972



Nicole Fabien
Rx4
8-13-72
P

Observation for....Mme. Nicole Fabien

3

Date....February 1973

Subject.....French One

by ...Sr. Ann Gray

LESSON PLAN.....Series of Warm-up questions

Teacher encouraged the students to make up their own questions

General vocabulary and basic structures were reviewed

Numbers were introduced by use of Overhead followed by oral pronunciation and recitation of the numbers.

Review of vocabulary with use of new word in a sentence by means of the question form. "Qu'est-ce que C'est....."

Review of certain prepositions on a flash card: devant, avant, derriere apres sur au dessous de sous contre. The prepositions were linked to class room objects in sentence form

Finally use of work books for written exercises of prepositions was used.

TEACHER PRESENTATION....Mrs. Fabien presents a well organized lesson in a pleasant and patient manner, taking care to repeat her questions and see to it that her students participate in the oral activity of the day's lesson.

ATMOSPHERE OF LEARNING...

The students are very attentive to the progress of the lesson and are eager to perform well. They have sufficient time to hear the model voice and repeat it.. It would seem that the classroom atmosphere however would need more activity upon the part of the students, for they do not use their own imaginations enough. Perhaps more of a game atmosphere would reinforce some of the learning, for example, everyone must ask and answer 5 questions

Signed Nicole Fabien Teacher

Sr. Ann Gray Dept. Head

Rx3
2-13-73
8

GC #4

Teacher Mr. Joseph Poole

Subject French 3

Date January 7, 1974

Period 4

Class size 20

1. What was the objective(s) of this class?

Learn to use vocabulary in dialogue

Prepare for an Oral quiz on the substance of this lesson

2. How were the students made aware of the objectives of this class?

With the teacher present in the group, students read assigned dialogue

3. How did the teacher attempt to motivate the students at the beginning of this lesson?

Motivation was supplied in an earlier lesson encouraging the students

to use the suggested vocabulary of the dialogue in situations of their own

4. What methods and techniques did the teacher use in the teaching/learning process?

Teacher used the group as center of instruction moving from one group to the other. The teacher handled four out of eight groups spending approx. fifteen minutes with each group.

In these groups the teacher supervised pronunciation, asked questions of comprehension and aided the individual student to arrive at the best

answer by offering translations and similar word replacements

Grammatical comprehension was checked

Student response was slow due to difficulty in understanding vocabulary

Their skills were not as mechanical as one would expect at this level

100-4 74
13

Students were instructed to continue answering the same questions with a view to taking a test. The remainder of the groups would have the benefit of teacher the next day.

Comments and recommendations by observer:

Mr. Poole is a teacher of experience and is conscientious in carrying out classroom instruction in the foreign language at this level. He demonstrates patience in eliciting responses from his students.

It is the belief of this observer that if a greater variety of drills designed to prepare the student for learning the main text or dialogue were introduced into the opening phase of the lesson in the form of warm-up drills, review of recently learned material etc. the overall response pattern of the student might be more mechanical and less time in class would be wasted waiting for the the student to develop skills he needs to continue his growth in conversational ability.

Sister Ann Gray

[Signature]

January 8, 1974

... a greater variety of drills mentioned above should take place. That is, due to the time factor, we are trying to introduce many exercises each day as possible.

Teacher Evaluation Form

Teacher Mr. Joseph Poole

Subject Beginning French

Date January 25, 1974

Period 3

Class Size 27

1. What was the objective(s) of this class?

Introduction of how to form the partitive when a noun is the direct object of the NEGATIVE form of the verb. (I don't have any time, etc.)

2. How were the students made aware of the objectives of this class?

Sentences illustrating formation of the partitive article (how some or any is expressed in French) were put on board. The negative of each sentence was also written on board with the partitive article left out.

3. How did the teacher attempt to motivate the students at the beginning of this lesson?

- Students were asked to copy above-mentioned sentences from board.
- Reference was made as to what was discussed yesterday which was the partitive article.

4. What methods and techniques did the teacher use in the teaching/learning process?

By eliciting translations of sentences, which were on board, from students

Mr. Poole explained formation of partitive with negative phrases. Teacher demonstrated the importance of the partitive in French, by telling a humorous anecdote. The following types of exercises were performed:

utilizing the book: questions-answers; directed sentence formations; written translation of oral sentences said in English. Teacher wrote corrected form of these sentences one-by-one on board. Those students who had done them incorrectly had to say why.

5. How did the students respond?

In general, students lacked spontaneity and motivation. Those students who responded to the lesson showed an interest of developing the basic skills of pronunciation and of course, learning the grammatical structure introduced.

6. What will be the follow up to this lesson?

It was observed that because it was Friday, therefore the weekend.

No homework was given.

Comment and recommendations by observer:

It was quite evident that Mr. Poole's knowledge of French is excellent. He is quite capable of explaining a certain grammatical structure with varying explanations and appropriate examples. Since this is a Beginning Class where students develop basic skills in language learning and where stress is given to the successful acquisition of the four language goals (Listening, Speaking, Reading, Writing) I would like to make the following recommendations:

- 1) Variety should be introduced to class by including the following elements:
 - a) Oral Warm-up drills
 - b) Oral Review of previous work
 - c) Correction of homework (if any)
 - d) Presentation of new lesson.
- 2) In presenting the new lesson, there should be a wide participation of students.
- 3) Repetition drills (by class, by rows, by groups, individual) should be conducted to help increase participation and interest.
- 4) Audio-Visual aids should be used wherever they are pertinent.
- 5) Student should be kept active by having them write sentences on board.

Patricia M. Anania
(observer)

[Signature]
(confirmed by teacher)

Feb. 5, 1974

(Date of Follow-up Conference)

Teacher Comment:

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Teacher Evaluation Form

8

R#2

Teacher Mrs. Nicole Fabien

Subject French (Cont. Tr. A)

Date February 8, 1974

Period 4

Class Size 20

1. What was the objective(s) of this class?

Explaining grammatical structures through corrections of questions in small group instruction.

2. How were the students made aware of the objectives of this class?

They were already aware of objectives from previous lesson.

3. How did the teacher attempt to motivate the students at the beginning of this lesson?

She directed them in French to form already-assigned groups and study questions from book.

4. What methods and techniques did the teacher use in the teaching/learning process?

The class was divided into 6 groups and instruction took place with one group at a time. Each group was composed of either 5, 4, 3, or 2 students. While correcting the questions, Mrs. Fabien utilized the audio-lingual method. She read questions from book, had each student respond and was able to correct a wrong answer through the discovering method; (i.e., other students had to tell why response was wrong and therefore, had to correct it themselves). She used a pointer to clarify any ambiguity and to answer any doubts from students.

How did the students respond?

Students enjoyed working and interacting with each other. While teacher was busy with one group, the other groups were very attentive and waiting for their turn.

1 x 2 / 5-13-74

These will be the topics of the next session.

Exercises were assigned from back.

Comment and recommendations by observer:

Rather than teaching French through the "traditional" method, Mrs. Fabien has very successfully adapted the group approach. This fairly new approach to language learning seemed to create an atmosphere conducive to learning and to meeting individual needs of students.

Mrs. Fabien proves to be very organized and of course, being a native speaker of French, has complete control of the language. She is very patient but firm. This is an ability to be commended.

Patricia M. O'Brien
(observer)

Mrs. Fabien
(conducted by teacher)

Feb. 26, 1974

(Date of follow-up conference)

Teacher Comment:

60

R41

Field Trip

Trip France 196

Date March 19, 1974

2

22

1. How were the students who were of the majority of the class?

- 1) Have students express themselves in French.
- 2) Teach "Descriptive Grammar"

2. How were the students who were of the majority of the class?

- 1) Students are asked after each class to have questions ready for the next session.
- 2) Explaining the meaning and

3. How did the teacher attempt to motivate the students who were of the majority of the class?

Students are told that the purpose of conversation in class is to force them using the language and

4. How did the teacher attempt to motivate the students who were of the majority of the class?

- 1) Asking students to detect oral mistakes and correct them. *Students had to show classroom cards.*
- 2) By using transparencies on the board. *any pressure from the teacher.*
Showing every subject from an and its stressed form. Having students repeat, read and write them separately. Using both programs in samples given by student.
Practicing & exercises in the classroom.

Students were relaxed and there was a good atmosphere of learning going on

2x1 Feb
18-13-74

the use of these words, referring to the rule in textbooks, as a comparison with English was made for better understanding.

- 1) Have at the same time, their oral mistakes corrected by their classmates.
- 2) Recalling the use of "Moi" in a dialogue previously studied in class.

Correction of written exercises for homework

The level of learning in the class was good and many opportunities for oral practice in the language were given to the students. The teacher, Mrs. Fabien, was conscientious in her presentation of the objectives to provide variety review of old material and introduction of new material on an overhead as well as repeating and having the students repeat after her to insure proper learning at this level of first year training.

As an observer of the class, I feel that the students did not correct their errors enough. Their accent should be better than it is. Pronunciation practice would be highly recommended. Students should be encouraged to speak more audibly in class.

When a new series of words is introduced they should always be put in a context and repeated many times first by the teacher then the group recital then by an individual. Perhaps it is better to learn only two persons at a time (first and third) before adding on the others.

Many difficulties could have been cleared up about the strangeness of the expression by showing its function in French just as English has another way of taking care of this function. The function of course common to both languages would be emphasis

Sister Ann Gray

Nicole Fabien

(continued on p. 13)

March 21 1974

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JD--639--74
Brooklyn, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

HENRY M. HALD HIGH SCHOOL ASSOCIATION
AND ROMAN CATHOLIC DIOCESE OF BROOKLYN

and

Case 29--CA--3813

LAY FACULTY ASSOCIATION, LOCAL 1261,
AMERICAN FEDERATION OF TEACHERS, AFL--CIO

Joel H. Friedman, Esq., for
the General Counsel.
Clifton, Budd & Burke, by
Howard Estock, Esq., and
Edward J. Burke, Esq.,
New York, N.Y., for
the Hald Association.
Eugene M. Kaufman, Esq., by
Charles D. Maurer, Esq.,
New York, N.Y., for Local 1261.

DECISION

Statement of the Case

BENJAMIN K. BLACKBURN, Administrative Law Judge: The charge was filed on April 15, 1974.^{1/} The complaint was issued on June 18. The hearing was held on August 13 in Brooklyn, New York.

The only issue litigated before me was the motive of Sister Ann Gray, chairman of the foreign language department, in recommending, and Hugh Kirwan, principal of Christ the King High School, in deciding that Joseph Poole, a teacher of French, not be rehired for the 1974--75 school year. For the reasons set forth below I

^{1/} No representative of the Roman Catholic Diocese of Brooklyn appeared at the hearing and no counsel entered an appearance on its behalf. Counsel for the Hald Association raised the issue of whether the charge had ever been served on the diocese. I find that it was, on June 17, 1974, by personal service on Brother Medard Shea, assistant superintendent for teacher personnel service on Schools Office of the Diocese of Brooklyn. This finding is based on testimony and an exhibit made part of the record in a companion case, Henry M. Hald High School Association, Roman Catholic Diocese of Brooklyn, and Sisters of St. Joseph, Case 29--CA--3823, tried before me on August 14, 1974.

find they were motivated in substantial part by his union activities and, therefore, Respondents violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs, I make the following:

Findings of Fact

I. Jurisdiction and Joint Employers

Other than the motive for the discharge of Joseph Poole, the only issue posed in this record is whether the Hald Association and the Roman Catholic Diocese of Brooklyn are, in the words of the complaint, "affiliated organizations, the joint employers of the employees in" a group of high schools which includes Christ the King. The circumstances under which the Roman Catholic Diocese of Brooklyn created the Hald Association and turned over to it the operation of certain diocesan high schools, including Christ the King, are the substance of Henry M. Hald High School Association and The Sisters of St. Joseph, 213 NLRB No. 54 (1974), an 8(a)(5) and (1) case. On September 23, 1974, the Board affirmed the rulings, findings, and conclusions of Administrative Law Judge Lowell Goerlich in that case, with modifications. In footnote 2 of its Decision and Order, the Board said:

In the absence of exceptions thereto we accept pro forma the finding of the Administrative Law Judge that the operations of the Respondent affect commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and his conclusion that the Board should assert jurisdiction here.

In this case, the parties agreed that the joint employer issue should be resolved on the basis of designated portions of the record made before Judge Goerlich. The question of jurisdiction is related to and, in a sense, part of that issue. Consequently, on the basis of those portions of the record made before Judge Goerlich which have been incorporated into the record in this case, as well as certain admissions as to jurisdictional facts contained in the Hald Association's answer, I make the same findings of fact as Judge Goerlich with respect to jurisdiction and the relationship between the Hald Association and the Roman Catholic Diocese of Brooklyn. I hereby incorporate those findings of fact into this Decision by reference. I also reach the same conclusions of law as Judge Goerlich, namely, that the Hald Association is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Hald Association "is clearly the alter ego of the Bishop of Brooklyn."

II. The Unfair Labor Practice

A. Credibility

The crux of this case is a conversation in the last week of March 1974 between Robert Gordon, president of Local 1261, and Sister Ann Gray and a

conversation on April 10, 1974, between Gordon and Hugh Kirwan. Gordon attributed to each statements which establish beyond a doubt their discriminatory motive for selecting Joseph Poole rather than Nicol Fabien for termination in the course of a reduction of the faculty at Christ the King High School. Each admitted that the conversation described by Gordon took place but denied categorically making the damning remarks. I credit Gordon over Sister Ann Gray because of the uncertainty of her recollection as to what was said, thus:

Q. Would you describe what occurred at that meeting, what was said?

A. The meeting, I believe, if it is the same one, was occasioned by just a conference with Mr. Gordon on certain teaching problems, marking and grading and so forth.

I do recall, as he left, he asked me a question about what I supposed would be taking place in the area of cutbacks in language. Of course, French, as everyone knew the focus was on French as a problem, the diminishment of the classes.

I recall saying yes, there are cutbacks and, yes, it is a problem.

I did not say anything about who would be the subject of a cutback.

Q. Did Mr. Gordon ask you who would be the subject of a cutback?

A. He may have asked me, but I did not divulge it. I don't recall him having asked me who. Or if he did ask me who, I did not say who.

To do so, it would have been a lack of integrity on my part, I feel.

* * * * *

Q. And do you recall whether Mr. Gordon asked you whether there had been any decision made as to Mr. Poole or Mrs. Fabien?

A. The question may have been asked.

I am almost---I am certain that I did not answer the question.

Q. You never told Mr. Gordon that it was a difficult choice but that you would prefer to retain Mrs. Fabien because she was a better teacher?

A. I may very possibly have said yes, it is a difficult choice. I did not say what the choice was.

And I might add that I had not perhaps even made the decision as to what the choice was at that time. [Emphasis supplied.]

and because of her admission that she made similar antiunion remarks at other times and under other circumstances, thus:

Q. Mr. Gordon also stated, I believe, that you stated to him at that meeting that you would have---that he would have to make a choice between the union and the school.

Did you make such a statement or anything like it?

A. I have made several statements on several different occasions expressing my opinion of what was happening to our school due to union activities, other activities.

I do recall having said, in a social context, not in an official way, that if things were to continue as they were with numerous grievances, etcetera, etcetera, that we would both see our school close.

Now, I said this colleague to colleague in a very free situation in which you would express an opinion.

I did not make it in any kind of closed, formal statement.

I credit Gordon over Kirwan because Kirwan admitted discussing Poole's connection with a grievance over teacher replacements filed by Gordon on November 20, 1973, thus:

Q. . . . Can you tell us whether at that April 10th meeting concerning the excess of Mr. Poole, or at any other meeting you may have had with Mr. Gordon in that area, whether you ever said to Mr. Gordon that Mr. Poole was a pain in the neck?

A. I did not.

Q. Did you ever say that Mr. Poole was a constant complainer?

A. No.

I think we did discuss Mr. Poole's case in the sense of the letter that came to me.

It was my assumption at that time that the original letter was a grievance being filed by Mr. Poole.

Q. Was that the General Counsel's Exhibit 2, I believe?

A. Right.

Q. That was discussed at the April 10th meeting?

A. Yes.

Q. Did you ever accuse Mr. Poole of running to the union?

A. I did not.

Q. Did you state to Mr. Gordon that you can't have people who are constantly running to the union?

A. I did not.

and because of the undisputed fact that Gordon only achieved tenure as a teacher at Christ the King after filing an unfair labor practice charge. The only other significant credibility conflict in the record involves the testimony of Gordon and Kirwan about the processing of a grievance in November 1973 over a day's pay for a teacher named Grace Krampe. In the course of their discussions, according to Gordon, Kirwan threatened to deny him tenure if Gordon did not

stop filing grievances. Kirwan denied making any such threat. I find the unfair labor practice charge which was filed at that time over that incident and then withdrawn when Gordon received tenure dispositive of the credibility questions both as to what Kirwan said in November 1973 and as to what he said on April 10, 1974.

B. Facts

Other than the aspects discussed above, the facts in this case are undisputed.

Joseph Poole joined the faculty at Christ the King when it opened in September 1963. For the most recent 7 or 8 years he taught French. Earlier, at various times, he taught Latin, English, and typing. He has been certified by the State of New York as a teacher of French, Latin, and Greek. He participated in a strike which Local 1261 called against the Hald Association in September 1973. Approximately 75 of Christ the King's 104 lay teachers walked out. Nicol Fabien was among those who did not. The strike lasted about a month, ending around October 15, 1973. Poole picketed at a school other than Christ the King during this period.

When the strike ended, one of the teachers at Christ the King, Grace Krampe, did not return to work until the second day. She was docked a day's pay. Gordon went to see Kirwan about the lost pay in November, sometime around the 20th. Gordon argued that Miss Krampe should be paid because she had been prevented by illness from returning to work with all the other teachers on the day the strike ended. He said that, if the matter could not be resolved by Kirwan and him, he would have to file a formal grievance. Kirwan said, "I'm sick and tired of all of these grievances, I've had all I can take of contracts and union." Kirwan reminded Gordon that, in the spring of 1973, when Local 1261 staged a 1-day walkout on May 1, Kirwan had pointed out to Gordon that he had not yet achieved tenure ^{2/} and had warned him that, if he did not cease making trouble by engaging in union activities, Kirwan would see to it that his contract was not renewed for the next school year. As a result of this reiterated threat to Gordon's tenure, the unfair labor practice charge alluded to in the section entitled "Credibility" above was filed. Gordon and Kirwan resolved the dispute over a day's pay for Grace Krampe without a formal grievance being filed. She got her money after filing a written statement that she had been ill on the day in question.

In the period following the strike Poole became concerned that he was being required to serve more than he should as a replacement for absent teachers during periods which he would otherwise have free under school policy that such duty should be shared equally by all teachers. He mentioned his concern

^{2/} Under the contract between the Hald Association and Local 1261, teachers achieve tenure at the end of 3 years, after which time they can only be discharged for cause.

to Gordon on November 19, 1973. Next day, Gordon prepared a letter to Kirwan dated November 20 and delivered it to Kirwan's office. The letter charged a violation of the contract between Local 1261 and the Hald Association in that Christ the King had failed to abide by the pertinent portion of the Hald Association's faculty and staff handbook. Poole's name was not mentioned in the body of the letter. It was included among a list of persons whom Gordon listed as receiving carbon copies of the letter. Kirwan's first response following receipt of this letter was to summon Poole to his office. Kirwan said, "Are you filing a grievance against me?"

Poole said, "Not really. I don't know what's going on." Kirwan showed him the letter. Poole said, "I don't know why my name is on it. I would assume that Mr. Gordon put my name on it because I was speaking to him around the same time that he wrote it and he wanted to let me know what was going on."

Poole became annoyed again in January 1974 about the frequency with which he was assigned replacement duty. He went to the office and protested to Sister Mary Brown, Kirwan's administrative assistant. She explained to him how she went about making the assignments. Poole pointed out that a woman teacher, one Miss Duffy, had received only half the assignments he had received. He asked Sister Mary Brown if she thought that was fair. She replied, "Are you saying that I'm unfair?"

Poole said, "Well, I have three [replacement periods] this week and it seems unfair that Miss Duffy didn't get one this week at all."

Sister Mary Brown said, "Are you saying that I'm unfair?"

Poole said, "No, I just asked you if you thought it was fair that I got three and she didn't have any this week."

The handbook contains a provision that not more than 10 faculty meetings which run beyond the end of the school day will be held in the course of a school year. Sometime in November Poole became concerned that the rate at which such meetings were being held would result in meetings which violated this provision long before the end of the school year. Consequently, around November 20, 1973, Poole wrote a note to Gordon about this situation. A couple of weeks later, Sister Ann Gray approached Poole and said, "I saw your note on Mrs Canavan's desk." (Mrs Canavan is an assistant principal. She participated in negotiations on behalf of Local 1261 prior to her promotion to that post.)

Poole said, "What note?"

Sister Ann Gray said, "Oh, it's in your handwriting."

Poole said, "Well I can't remember writing to Mrs. Canavan."

Sister Ann Gray said, "It's a note to Bob Gordon that I saw." Poole then realized she was talking about his note on too many faculty meetings. Sister Ann

Gray said, "I think you should have come to me rather than go running to Mr. Gordon with that information."

5 Poole said, "Well, I had intended to speak to you about it, but I placed it on Mr. Gordon's desk and it completely slipped my mind, I just completely forgot about it."

10 For economic reasons, the faculty at Christ the King had to be reduced by about 20 teachers for the 1974--75 school year. Under the contract between Local 1261 and the Hald Association, contracts must be tendered by April 15 for the ensuing year. Consequently, sometime in March, Sister Ann Gray, as head of the language department, was required to formulate her recommendations as to which teachers in that department should be let go. The department had to be reduced by several Spanish teachers and by one and a fraction French teachers. 15 The fraction was accomplished by Sister Ann Gray's dropping the two French classes she was teaching herself. This meant that one full-time French teacher had to be selected for termination from the three on the faculty. Sister Ann Gray immediately eliminated Marian Tobon from consideration because she could double as a Spanish teacher. (Miss Tobon is secretary of Local 1261.) As 20 between the two remaining candidates---Joseph Poole and Nicol Fabien---Sister Ann Gray decided to recommend that Poole be terminated. She presented that recommendation at a meeting of the school's administrators, chaired by Kirwan, in late March. Kirwan accepted her recommendation after a discussion of the relative merits of Poole and Mrs. Fabien as teachers of French. There was no 25 mention of Poole's union membership, activities, attitudes, or interests at this meeting. Neither was there any mention of Mrs. Fabien's lack of same.

30 During the last week in March, Gordon spoke to Sister Ann Gray about cuts in her department. When she told him that French was an area affected because of enrollment problems, he asked whether any decision had yet been made as to who would be terminated. She replied that her role was only to make a recommendation but that, if it were her choice, she would keep Mrs. Fabien, who was a quiet teacher and did not give any trouble, rather than Poole, who was constantly complaining, going to the Union, and filing grievances. Gordon said he thought 35 this was unfair and not the basis on which the selection should be made. Sister Ann Gray said that Poole, like Gordon, was interested only in increased salaries and better working conditions and that they would all have to make a choice between the Union and the school.

40 On April 2, 1974, Gary Tankard, an assistant principal, asked Poole to come to the office. Poole joined Tankard there a few minutes later. Tankard said, "Do you know why you're here?"

45 Poole said, "Not really." He asked whether it had something to do with one of the boys in his homeroom who had gotten into trouble shortly before.

Tankard said, "No. You really don't know what you're here for? Well, we have decided to let you go."

Poole said, "How do you feel about it?"

5 Tankard said, "Well, Mr. Kirwan and I have never been in your class. Therefore, it was done on the recommendation of the department chairman, Sister Ann. She decided to keep Mrs. Fabien because she decided Mrs. Fabien was a better teacher. If you would like, I can get you in to see Mr. Kirwan right away."

10 Poole said, "Well, I don't see any reason to go and speak to Mr. Kirwan. He's made his decision. I just want to get out of here."

15 Tankard said, "Well, if you're out in the hallway and you see Sister Ann, it would be better if you said nothing to her."

20 On April 3, 1974, Poole told Gordon what had happened. On April 10, Gordon went to see Kirwan about various matters, including Poole's termination. Gordon said Poole had not been given any reason for being discharged. He told Kirwan he would like to know the reason. Kirwan said that he did not have any obligation to give a reason, but that if he was required to put something in writing he would say that Poole's position had been eliminated. Kirwan said Poole had been selected because he was a pain in the neck, a constant complainer who was always running to the Union when he did not get his own way. He mentioned specifically Poole's complaints over the replacement duty and excessive faculty meetings. He said he was sick and tired of grievances. He said it was common knowledge that Poole had been one of the picket organizers during the strike.

30 Gordon tried to persuade Kirwan that Mrs. Fabien should have been selected rather than Poole. He pointed out, accurately, that Mrs. Fabien was qualified to teach only French, that she had been at Christ the King only 6 years while Poole had been there 11, that she was not certified in any language while Poole was certified in three, that Poole had a master's degree while she had none, and that it was only thanks to a grandfather clause in the Local 1261-Local Association Contract which had been insisted on by the association that Mrs. Fabien was permitted to continue at the school from year to year despite her lack of certification. Gordon said the discharge of Poole was creating a severe morale problem since the teachers were seeing it as a discrimination for union activities. He urged Kirwan to reconsider for the sake of the school. Kirwan said that he would. Gordon suggested, as a compromise, a 1-year sabbatical for Poole during which he would acquire enough credits so that he could return in the 1975--76 school year as a Spanish teacher.

40 That evening Kirwan telephoned Gordon at home. Kirwan said that he had discussed Poole's termination with others and a decision had been reached that Poole's attitude was such that he could not be allowed to remain at Christ the King. He said, however, it might be possible to offer Poole a sabbatical along

the lines suggested by Gordon. Gordon said he would check with Poole and get back to Kirwan. Gordon telephoned Poole and discussed the sabbatical idea. Poole rejected it. Gordon telephoned Kirwan and told him of Poole's decision.

C. Analysis and Conclusions

On September 23, 1974, the same day it issued its Decision and Order in Henry M. Hald High School Association and The Sisters of St. Joseph, supra, the Board announced that it has under consideration "the issuance of a rule under which it would decline to assert jurisdiction over any aspect of the labor relations of private secondary and elementary schools and preschools." I presume that these two events did not occur simultaneously by coincidence and that, therefore, high schools operated by the Roman Catholic Church or its alter egos are the sort of "private secondary . . . schools" the Board has in mind. Consequently, it is likely that this case will ultimately be disposed of at the Board level by dismissal on jurisdictional policy grounds. With knowledge of that situation, I have decided to issue my Decision at this time in the interest of expeditious case handling rather than wait to see whether the Board does, in fact, adopt the rule it is considering.

In view of the situation, the detailed analysis of the record I would have made to explain my conclusion that the record as a whole supports a finding of discriminatory motive even without the damning remarks made to Robert Gordon by Sister Ann Gray during the last week in March 1974 and by Hugh Kirwan on April 10, 1974, is superfluous. Kirwan testified his motive for accepting Sister Ann Gray's recommendation that Joseph Poole be terminated rather than Nicol Fabien was "[t]he very strong consensus of the whole group [at the meeting of the school's administrators at which the decision was made], which is one of the ways that I would deal with such a problem, the department chairman, assistant chairmen were involved and all of the administrators, the agreement was, in the end, that Mrs. Nicol Fabien was the better of the two teachers" because of "[h]er rapport with the students, her approach to teaching, just in general that she was a better teacher than Mr. Poole, not that Mr. Poole was a poor teacher." Sister Ann Gray testified she recommended Poole be terminated rather than Mrs. Fabien because "[i]t was felt, on my part, that Mrs. Fabien possessed a greater ability to communicate the culture of her language also had a greater rapport with the students. . . at times Mr. Poole has shown a certain inability to adjust to new teaching methods or to the philosophy as we were trying to propose it and a certain lack of creativity also in the teaching of his classes, which does not say he is bad. . . . Mr. Poole's rapport with the students on the whole. . . [by "philosophy" I mean] where the emphasis lies, which would be on oral performance of the language over and above the intake of reading and writing and translation." I have no doubt these thoughts were in Kirwan's and Sister Ann Gray's minds and were the subjects discussed at the decisive meeting of the administrators. In the face, however, of Kirwan's and Sister Ann Gray's statements to Gordon, there can be no doubt that what tipped a closely balanced scale in Mrs. Fabien's

direction was the fact Kirwan and Sister Ann Gray viewed Poole as an agitator. Since his agitation took the form of union activity, it follows that they were motivated in substantial part by a reason proscribed by the Act. I find, therefore, Respondents violated Section 8(a)(3) and (1) when, on April 2, 1974, they terminated the employment of Joseph Poole, effective August 31, 1974.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

Conclusions of Law

1. Henry M. Hald High School Association and the Roman Catholic Diocese of Brooklyn are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Henry M. Hald High School Association and the Roman Catholic Diocese of Brooklyn are affiliated organizations with common direction and labor relations policy and are joint employers of employees at Christ the King High School.

3. Lay Faculty Association, Local 1261, American Federation of Teachers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. By terminating the employment of Joseph Poole on April 2, 1974, effective August 31, 1974, for engaging in union activities Respondents have violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

In order to effectuate the policies of the Act, it is necessary that Respondent be ordered to cease and desist from the unfair labor practice found, remedy it, and post the usual notice. I will, therefore, recommend Respondents be ordered to reinstate Joseph Poole and make him whole for any earnings lost as a result of the discrimination against him by the payment of backpay computed on a quarterly basis, plus interest at 6 percent per annum, as prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

3/ ORDER

Henry M. Hald High School Association, its officers, agents, successors, and assigns, and the Roman Catholic Diocese of Brooklyn, its agents, successors, and assigns, shall:

3/ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.43

(continued)

1. Cease and desist from:

(a) Discharging employees for engaging in union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Joseph Poole immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any earnings he lost, plus interest, as a result of his discharge on April 2, 1974, effective August 31, 1974.

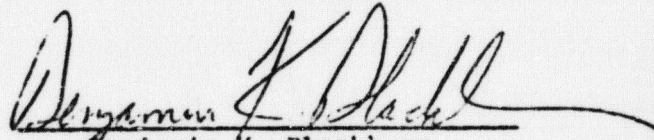
(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at all the high schools operated by Henry M. Hald High School Association in Brooklyn, New York, including Christ the King, copies of the attached notice marked "Appendix." ^{4/} Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated at Washington, D.C.

September 30, 1974


Benjamin K. Blackburn
Administrative Law Judge

^{3/} of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

^{4/} In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a trial, that we violated Federal law by discharging an employee for engaging in union activities, we hereby notify you that:

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other aid or protection
- To refrain from any or all of these things.

WE WILL NOT discharge you for engaging in union activities.

WE WILL NOT, in any like or related manner, interfere with you or attempt to restrain or coerce you in the exercise of the above rights.

WE WILL offer Joseph Poole immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any earnings he lost as a result of his discharge on April 2, 1974, effective August 31, 1974.

HENRY M. HALD HIGH SCHOOL ASSOCIATION
AND THE ROMAN CATHOLIC DIOCESE OF BROOKLYN
(Employers)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212--596--3535.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

-----X
In the Matter of :

HENRY M. HALD HIGH SCHOOL ASSOCIATION, :

Respondent, :

- and - :

ROMAN CATHOLIC DIOCESE OF BROOKLYN, :

Respondent, :

- and - :

LAY FACULTY ASSOCIATION, LOCAL 1261, :
AMERICAN FEDERATION OF TEACHERS, AFL-CIO, :

Charging Party. :
-----X

CASE NO.
29-CA-3813

EXCEPTIONS OF RESPONDENT, HENRY M. HALD
HIGH SCHOOL ASSOCIATION, TO CERTAIN PORTIONS
OF THE ADMINISTRATIVE LAW JUDGE'S DECISION

Administrative Law Judge, Benjamin K. Blackburn, issued his Decision and Recommended Order in the above captioned matter on September 30, 1974, wherein he found Respondent Henry M. Hald High School Association (hereinafter "Respondent Hald") guilty of certain unfair labor practices at Christ the King High School, that Respondent Hald and the Respondent Roman Catholic Diocese of Brooklyn were joint employers of teachers in Christ the King High School and that Respondent Hald was the alter ego of the Bishop of Brooklyn. Respondent Hald respectfully urges the Board to modify those portions of the Administrative Law Judge's Decision and Recommended Order to which it hereby excepts pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board.

Respondent Hald takes the following exceptions to the aforesaid Decision and Recommended Order and will submit a Brief in support thereof:¹.

1. The Administrative Law Judge erred in finding that the Respondent Hald's choice of Joseph Poole for termination was motivated by his union activities (entire decision).

2. The Administrative Law Judge erred in not dismissing the complaint on the basis that the evidence, considered as a whole, does not support a finding that Respondent Hald

1. References to the Decision of the Administrative Law Judge are cited thus: (JD. ____); References to the Transcript of Proceedings are cited thus: (Tr. ____).

was motivated by reasons proscribed by the National Labor Relations Act in selecting Joseph Poole for termination. This finding should have appeared at (JD. 9 line 45).

3. The Administrative Law Judge erred in crediting the testimony of Robert Gordon over that of Hugh Kirwan and Sister Ann Gray. (JD. 3, line 6; JD. 4, line 16).

4. The Administrative Law Judge erred in finding that certain facts were undisputed; to wit: Statements attributed to Hugh Kirwan at (JD. 5, lines 26 - 34) were in dispute; Statements attributed to Sister Ann Gray at (JD. 7, lines 31 - 35) were in dispute.

5. The Administrative Law Judge erred in finding that Respondent Hald and Respondent Roman Catholic Diocese of Brooklyn are joint employers of teachers at Christ the King High School (JD. 2, line 35; JD. 10, Lines 16 - 18).

6. The Administrative Law Judge erred in finding that the Respondent Hald is the alter ego of the Bishop of Brooklyn. (JD. 2, lines 42 - 43).

7. The Administrative Law Judge erred in not dismissing the complaint upon the basis that to do otherwise would result in an excessive entanglement between government and religion, which result is proscribed by the first amendment to the United States Constitution. This finding should have appeared at (JD. 10, line 12).

8. The Administrative Law Judge erred in not declining to assert jurisdiction upon the discretionary grounds that the assertion of jurisdiction would not further the purposes of the Act. This finding should have appeared at (JD. 10, line 14).

Respectfully submitted,

CLIFTON BUDD & BURKE
By:
420 Lexington Avenue
New York, New York 10017
212 - 889 - 3350

OF COUNSEL

EDWARD J. BURKE
HOWARD G. ESTOCK

TO:

Mr. John C. Truesdale
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Eugene M. Kaufman, Esq.
260 Park Avenue South
New York, New York 10010

Joel Friedman, Esq.
National Labor Relations Board
Region 29
16 Court Street
Brooklyn, New York 11205

BEST COPY AVAILABLE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HENRY M. HALD HIGH SCHOOL ASSOCIATION
AND ROMAN CATHOLIC DIOCESE OF BROOKLYN

and

Case 29--CA--3313

LAY FACULTY ASSOCIATION, LOCAL 1261,
AMERICAN FEDERATION OF TEACHERS, AFL--CIO

DECISION AND ORDER

On September 30, 1974, Administrative Law Judge Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, Respondent Henry M. Hald High School Association filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,^{1/} and conclusions of the Administrative Law Judge and to adopt his recommended Order.

^{1/} Respondent Henry M. Hald High School Association has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents, Henry M. Hald High School Association and Roman Catholic Diocese of Brooklyn, Brooklyn, New York, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

FEB 4 1975

John H. Fanning, Acting Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

THE FOLLOWING DOCUMENT IS NOT PART OF THE RECORD.

IT HAS BEEN INCLUDED IN THE APPENDIX AT RESPONDENT'S
REQUEST ONLY.



NATIONAL LABOR RELATIONS BOARD

REGION 29

32

16 Court Street

Brooklyn, New York 11201

Telephone 596-3535

Henry M. Hald High School Assn.
345 Adams Street
Brooklyn, New York 11201

OCT 28 1975

Re: Henry M. Hald High School Association

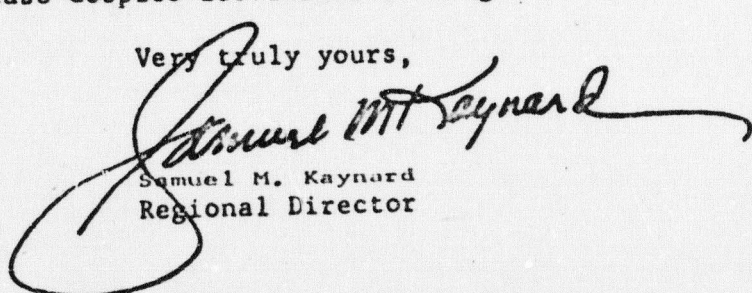
Case No. 29- CA-3813

Gentlemen:

Satisfactory evidence having been submitted of compliance with the Board Order in the above case insofar as it requires certain affirmative action to be taken, and no evidence having been presented of the failure to comply with the requirement for refraining from engaging in certain conduct, the instant case is hereby closed and will remain closed, conditioned upon continued compliance with said Board Order.

You are cautioned that subsequent violations of the National Labor Relations Act may become the basis for further proceedings in the instant case despite its formal closing.

Very truly yours,


Samuel M. Kaynard
Regional Director

cc: Roman Catholic Diocese of Brooklyn, Catholic Schools Office, 345 Adams Street, Brooklyn, New York 11201; Roman Catholic Diocese of Brooklyn Office of the Secretary, 75 Greene Avenue, Brooklyn, New York; Lay Faculty Assn., Local 1261, American Federation of Teachers, AFL-CIO 175-20 Wexford Terrace, Jamaica, Estates, New York 11432; Clifton, Budd & Burke, 420 Lexington Avenue, Room 2814, New York, New York 10017, Attn: Howard Estock; Eugene M. Kaufman, Esq., N.Y. State United Teachers, Inc., 260 Park Avenue South, New York, New York 10010

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)

Petitioner,)

v.)

No. 76-4259

HENRY M. HALD HIGH SCHOOL)

ASSOCIATION, and ROMAN)

CATHOLIC DIOCESE OF BROOKLYN,)


Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the appendix in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Edward J. Burke, Esq.
Howard G. Estock, Esq.
Clifton, Budd & Burke
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New York, New York 10017

Eugene M. Kaufman, Esq.
Charles D. Maurer, Esq.
N.Y. State United Teachers, Inc.
260 Park Ave. South
New York, New York 10010


Elliott Moore

Elliott Moore

Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 24th day of February, 1977.